

8-12-2015

## Entek GRB, LLC v. Stull Ranches, LLC: Upholding the Dominance of the Mineral Estate

Tyson Welch

Follow this and additional works at: <https://digitalcommons.du.edu/dlrforum>

---

### Recommended Citation

Tyson Welch, Entek GRB, LLC v. Stull Ranches, LLC: Upholding the Dominance of the Mineral Estate, 93 Denv. L. Rev. F. (2015), available at <https://www.denverlawreview.org/dlr-online-article/2015/8/12/entek-grb-llc-v-stull-ranches-llc-upholding-the-dominance-of.html>

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review Forum by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

# *ENTEK GRB, LLC v. STULL RANCHES, LLC*: UPHOLDING THE DOMINANCE OF THE MINERAL ESTATE

## INTRODUCTION

*Entek GRB, LLC v. Stull Ranches, LLC*<sup>1</sup> addressed a common dispute in the western United States—a dispute between the surface owner and the mineral owner of a severed estate. As Judge Gorsuch articulated in *Entek*: “When you own property in the West you don't always own everything from the surface to the center of the Earth. Someone else might own the minerals lying underground and the right to access them. Someone else still might own the right to use the water flowing through your property. All this can invite confusion—and litigation.”<sup>2</sup>

A severed estate occurs when different parties own the surface rights and minerals rights on a single parcel of land.<sup>3</sup> Severed estates are generally the result of the federal government reserving the mineral rights from land patents or private parties granting or reserving mineral interests.<sup>4</sup> The mineral estate is generally considered the dominant estate, which allows its owner to reasonably use the surface estate to develop the minerals underlying the property.<sup>5</sup> There are limits on the mineral estate's dominance, however, through principles such as the accommodation doctrine.<sup>6</sup>

Another key component of *Entek* was that the mineral rights to the parcels in question had been joined together through a concept called unitization.<sup>7</sup> Unitization is a method of conservation that the oil and gas industry uses to prevent waste.<sup>8</sup> Some commentators have suggested that it is the best method of conservation.<sup>9</sup> Unitization combines multiple tracts of land with separate owners overlying all or part of a common mineral reservoir for joint recovery operations.<sup>10</sup> Generally, the working

---

1. 763 F.3d 1252 (10th Cir. 2014).

2. *Id.* at 1253.

3. Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419, 423 (1998).

4. Robert E. Witwer, *Tension Beneath the Surface: The Evolving Relationship Between Surface and Mineral Estates*, 30 COLO. LAW. 67, 67 (2001).

5. Mergen, *supra* note 3, at 432.

6. *Id.* at 433.

7. *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1255 (10th Cir. 2014) (explaining that the Focus Ranch Unit Agreement “includes the relevant portions of Stull's surface estate and BLM's land”).

8. Owen L. Anderson & Ernest E. Smith, III, *The Use of Law to Promote Domestic Exploration and Production*, in *Fiftieth Annual Institute on Oil and Gas Law and Taxation 2-1, 2-64 to 2-65* (Carol J. Holgren ed., 1999).

9. *Id.* at 2-64.

10. JOHN S. LOWE ET AL., *CASES AND MATERIALS ON OIL AND GAS LAW* 752 (6th ed. 2013).

interest owners<sup>11</sup> of at least 85% of the acres within a proposed unit must agree to cooperative development in order to form a unitization plan.<sup>12</sup> The Secretary of the Interior must approve the unitization plans.<sup>13</sup> The Secretary must determine that the unit plan is “necessary or advisable in the public interest” to approve it and may alter the leases included in the plan to protect the public interest.<sup>14</sup> Unitization agreements generally provide that “operations performed on any tract of unitized lands will be deemed to be performed upon, and for the benefit of, every . . . tract of unitized land.”<sup>15</sup> The United States Court of Appeals for the Tenth Circuit primarily relied on the language of the Stock-Raising Homestead Act, the unitization amendment to the Mineral Leasing Act, and the language of the unitization agreement to find that all of the surface within a unit should be treated as a single parcel, with respect to mineral development.<sup>16</sup> Thus, the court held that Entek GRB, LLC (Entek) had the right to enter and occupy the surface of any parcel within the unit, so long as it was reasonably incident to mineral development on the surface of any parcel within the unit, which included the access road on Stull Ranches, LLC’s (Stull) property.<sup>17</sup>

Stull lost this case because it failed to make its argument within the structure of established mineral law, as incorporated into federal statutes. If Stull had argued for specific reasonable alternatives to using the road across its land in accordance with the accommodation doctrine, this case may have been decided differently.<sup>18</sup> This ruling has some implications for many Western States where severed estates are quite common.<sup>19</sup> Surface owners must now be aware that mineral owners may be able to use the surface owners’ land for mineral development on adjacent parcels, if the leases have been unitized. However, this creates only a slight variation on the general right of access for mineral owners, and as this comment will discuss, it is the correct way to deal with surface access rights for mineral development on unitized lands. Thus, this case likely does not have significant implications for Western States or the owners of severed estates.

---

11. The working interest owner is the person that has the right to “search, develop, and produce oil and gas” on a property. JOHN S. LOWE, *OIL AND GAS LAW IN A NUTSHELL* 515 (6th ed. 2014). This interest is usually granted to a leaseholder, such as Entek in this case. *Id.* at 46.

12. THOMAS A. MARRANZINO, JESSICA B. PINK & ANNA C. CAVALERI, *A PRIMER ON FEDERAL UNITIZATION, UNIT AGREEMENTS AND UNIT OPERATING AGREEMENTS* 6, available at <http://jay.law.ou.edu/faculty/Hampton/Mineral%20Title%20Examination/Spring%202012/Federal%20Unitization%20Primer%20Tom%20Marranzino.pdf>.

13. 30 U.S.C. §226(m) (2014).

14. *Id.*

15. MARRANZINO ET AL., *supra* note 12, at 17.

16. Entek GRB, LLC v. Stull Ranches, LLC, 763 F.3d 1252, 1254–56 (10th Cir. 2014).

17. *Id.* at 1256.

18. See discussion of the accommodation doctrine *infra* Part III.B.

19. Marvin D. Truhe, *Surface Owner v. Mineral Owner or “They Can’t Do That, Can They?”*, 27 S.D. L. REV. 376, 380 (1981-1982).

Part I of this comment provides background information on the relevant federal statutes that the court relied upon, as well as the current law in Colorado relating to unitization of mineral estates. Part II summarizes the facts, procedural history, and opinion in *Entek*. Part III discusses the difficulties of having severed estates and provides some recommendations for easing tensions between the two estates.

## I. BACKGROUND

This part discusses the statutes that the Tenth Circuit relied upon to decide *Entek*. First, it will discuss the Stock-Raising Homestead Act of 1916, which granted the surface estate to Stull's successor in interest and reserved the minerals to the United States. Next, it will examine the Mineral Leasing Act, and the subsequent amendment that allowed for unitization of federal mineral leases. Finally, it will touch on unitization law in Colorado.

### A. Stock-Raising Homestead Act of 1916

The Stock-Raising Homestead Act of 1916<sup>20</sup> (SRHA or 1916 Act) was passed in response to public outcry about the government giving away the valuable subsurface minerals with the land grants that it was using to encourage settlement of the west.<sup>21</sup> Under the SRHA, the federal government transferred the surface estate to individual homesteaders but reserved the mineral estate.<sup>22</sup> The SRHA granted larger homesteads than previous land grants, up to 640 acres.<sup>23</sup> Congress passed the Act allowing the larger grants because the homesteader was gaining only the right to use the surface without any right to the minerals under the land.<sup>24</sup> Only lands that the Secretary of Interior deemed suitable for stock raising were open for settlement under the SRHA.<sup>25</sup> Additionally, settlers were required to make permanent improvements to the land in the amount of \$1.25 per acre.<sup>26</sup> About thirty-three million acres of federal land, primarily in the Western States, were patented to homesteaders under the SRHA.<sup>27</sup>

---

20. 43 U.S.C. § 299 (2014).

21. *Entek*, 763 F.3d at 1254.

22. Matt Micheli, *Showdown at the OK Corral – Wyoming's Challenge to U.S. Supremacy on Federal Split Estate Lands*, 6 WYO. L. REV. 31, 32 (2006).

23. *Id.* at 32. Throughout much of the nineteenth century, the federal government sold off federal land to settlers. CHRISTINE A. KLEIN, FEDERICO (FRED) CHEEVER & BRET C. BIRDSONG, *NATURAL RESOURCES LAW* 65 (2013). However, the government eventually changed its stance on federal lands and began granting these western lands to settlers who would occupy and work the land. *Id.* The first act that granted land to homesteaders was the Homestead Act of 1862, which granted 160 acres and, unlike the SRHA, included both the surface and the underlying minerals. *Id.* at 65–66.

24. Micheli, *supra* note 22, at 33.

25. PAUL W. GATES & ROBERT W. SWENSON, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 517 (1968).

26. *Id.*

27. Truhe, *supra* note 19, at 382.

The SRHA altered the established common law regarding surface owners and mineral owners by providing that the United States, or its lessees, have the right to enter the land granted under the Act (the surface estate) to locate the minerals that were reserved to the United States.<sup>28</sup> However, the Act provided that the mineral developer must not damage permanent structures and is liable for any damage to crops.<sup>29</sup> The SRHA gave the mineral developer the right to “re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals . . . .”<sup>30</sup> The SRHA also set forth the requirements for re-entry: (1) written consent of the landowner; (2) payment for damages to crops or other tangible improvements; or (3) executing a bond to the United States for the benefit of the landowner to cover damages to crops or other tangible improvements.<sup>31</sup> The legislative history of the SRHA shows that Congress also intended to reserve the right to modify the surface and mineral owners’ rights, in relation to mineral development, with subsequent legislation.<sup>32</sup>

#### *B. Mineral Leasing Act and Unitization Amendment*

In order to facilitate development of the minerals under the homestead lands, Congress passed the Mineral Leasing Act in 1920.<sup>33</sup> Originally, the Mineral Leasing Act gave the Secretary of the Interior authority to lease mineral development rights on individual parcels of land to private parties.<sup>34</sup> However, as early as 1916, people began to realize that regulation of oil and gas development should focus on the geological structure that the minerals are found in, rather than surface boundaries overlying the minerals, because oil and gas fields<sup>35</sup> do not follow the surface property lines.<sup>36</sup> The idea of cooperative development plans on public lands was initially dismissed as a potential violation of the anti-trust provision of the Mineral Leasing Act.<sup>37</sup>

Oil and gas fields have traditionally been developed subject to the rule of capture.<sup>38</sup> The rule of capture “gives the surface owner all rights to oil and gas withdrawn from his land, even though the oil and gas may

---

28. 43 U.S.C. § 299(a).

29. *Id.*

30. *Id.*

31. *Id.*

32. Micheli, *supra* note 22, at 40.

33. Entek GRB, LLC v. Stull Ranches, LLC, 763 F.3d 1252, 1254 (10th Cir. 2014).

34. *Id.*

35. A field is “[a] geographical area under which an oil or gas reservoir lies.” *Glossary of Oil and Gas Terms*, COLORADO OIL AND GAS CONSERVATION COMMISSION, <https://cogcc.state.co.us/> (last visited March 1, 2015).

36. David W. Miller, *The Historical Development of the Oil and Gas Laws of the United States*, 51 CALIF. L. REV. 506, 520 (1963).

37. *Id.* After *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), Congress was very conscious of oil and gas monopolies, so it limited the amount of public land that one person or company could lease at one time with the Mineral Leasing Act of 1920. *Id.* at 533.

38. MARRANZINO ET AL., *supra* note 12, at 1.

have migrated from pools beneath adjoining lands.<sup>39</sup> This rule caused developers to produce as much oil or gas as fast as they could, whether the market needed it or not, to ensure that others with land over the same oil or gas reservoir did not extract the minerals first.<sup>40</sup> So when the Mineral Leasing Act was passed, it is no surprise that oil and gas developers rushed to claim the newly opened public lands.<sup>41</sup> Due to wasteful development and a fear of an oil famine, President Hoover closed the public lands to further leasing or disposal from March 12, 1929 to April 4, 1932.<sup>42</sup>

To try to stop this wasteful development of oil and gas fields, Congress passed an amendment to the Mineral Leasing Act in 1931.<sup>43</sup> This amendment allowed all lessees in a single field to develop “a cooperative or unit plan of development or operation of such pool, field, or like area.”<sup>44</sup> This amendment required the Secretary of the Interior to approve these unitization plans.<sup>45</sup> In addition, it granted the Secretary the authority to alter existing federal mineral leases to accommodate the unitization agreements.<sup>46</sup> Under this amendment, production from any well within the unit would hold all of the leases committed to the unit.<sup>47</sup>

### C. Colorado Unitization Law

Colorado has its own unitization statute.<sup>48</sup> The statute authorizes the Colorado Oil and Gas Conservation Commission to approve combining leases into a unit if it is “in the public interest for conservation or is reasonably necessary to increase ultimate recovery or to prevent waste of oil or gas.”<sup>49</sup> This statute has a similar provision to the unitization amendment to the Mineral Leasing Act, which states that operations on any portion of the unit are deemed to be operations on each tract within the unit.<sup>50</sup> Thus, production on one tract of land within the unit is likely to hold all leases in the unit under the Colorado statute, just as the Mineral Leasing Act does for federal units. Colorado also has a conservation stat-

---

39. Miller, *supra* note 36, at 518.

40. *Id.*

41. *Id.* Within a year after the passage of the Mineral Leasing Act, 5,000 prospecting permit applications had been filed. JOHN ISE, THE UNITED STATES OIL POLICY 353 (1926). By the end of June 1924, prospectors had filed a total of 32,103 applications under the Act. *Id.* However, very few prospectors actually discovered minerals and were issued a permit. *Id.*

42. Miller, *supra* note 36, at 520.

43. *Id.* at 521. The unitization amendment was passed after a temporary amendment to the Mineral Leasing Act authorizing cooperative development of the Kettleman Hill Field in California was successful at eliminating waste. *Id.* at 520–21.

44. Entek GRB, LLC v. Stull Ranches, LLC, 763 F.3d 1252, 1255 (10th Cir. 2014) (quoting 30 U.S.C. §226(m)).

45. 1 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 16.01 (3d ed. Matthew Bender 1989).

46. *Id.*

47. *Id.*

48. See COLO. REV. STAT. § 34-60-118 (2014).

49. § 34-60-118(1).

50. § 34-60-118(9).

ute that allows the state to protect landowners' rights, if operations are not being conducted properly on federal lands.<sup>51</sup> However, the statute explicitly states that it does not apply to federal units, with a few exceptions.<sup>52</sup>

## II. ENTEK GRB, LLC V. STULL RANCHES, LLC

### A. Facts

Stull operates a grouse hunting business on its land in rural Colorado.<sup>53</sup> Stull's predecessor in interest obtained the land through a land grant from the federal government made under the SRHA.<sup>54</sup> The 1916 Act granted homesteaders the surface land but reserved the mineral rights to the federal government.<sup>55</sup>

Entek holds leases to the minerals under much of Stull's land and the adjacent parcels.<sup>56</sup> Entek has an existing well on a parcel adjacent to Stull's land that the Bureau of Land Management (BLM) owns.<sup>57</sup> The Focus Ranch Unit Agreement had combined Entek's leases to the minerals under both parcels into a unit.<sup>58</sup> The Secretary of the Interior approved the Focus Ranch Unit Agreement, which included a total of 40,000 acres.<sup>59</sup>

Clayton Williams previously held Entek's leases.<sup>60</sup> He went to court with another landowner, Three Forks Ranch, in an attempt to cross that surface estate in order to reach a well on an adjacent party's land.<sup>61</sup> The district court found that the Focus Ranch Unit Agreement did not permit Mr. Williams to cross the Three Forks Ranch's land to get to a well on another property.<sup>62</sup> Prior to an appeal, Mr. Williams entered into an agreement with Stull to cross its land to get to the well.<sup>63</sup> However, Stull eventually cancelled the agreement, and it was never assigned to Entek when Entek took over the leases.<sup>64</sup>

There is currently only one road that would allow access to Entek's well on the BLM land, and it crosses Stull's land.<sup>65</sup> Entek asked permis-

---

51. Kenneth D. Hubbard, *The Application of State Conservation Laws to Oil and Gas Operations on the Public Domain*, 32 ROCKY MTN. L. REV. 109, 124 (1959-1960).

52. COLO. REV. STAT. § 34-60-120(1)(b) (2013).

53. Entek GRB, LLC v. Stull Ranches, LLC, 763 F.3d 1252, 1253 (10th Cir. 2014).

54. *Id.* at 1254.

55. *Id.*

56. *Id.* at 1253.

57. *Id.*

58. *Id.* at 1255.

59. *Id.*

60. *Id.* at 1258.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1253.

sion to enter Stull's land to develop new wells on that parcel and to gain access to the well on the BLM land.<sup>66</sup> However, Stull denied access to Entek because it was concerned that Entek's presence would be detrimental to its grouse hunting business.<sup>67</sup>

### *B. Procedural History*

Entek filed suit in the U.S. District Court for the District of Colorado in an attempt to gain access to Stull's land.<sup>68</sup> At summary judgment, the district court granted Entek access to Stull's land to conduct mineral production on that parcel.<sup>69</sup> However, it held that Entek could not cross Stull's property to gain access to the well on the BLM land.<sup>70</sup> Entek appealed to the Tenth Circuit in an attempt to gain access to Stull's land in order to access the well on the BLM land.<sup>71</sup>

### *C. Opinion*

The Tenth Circuit reversed the decision of Judge Brimmer of U.S. District Court for the District of Colorado granting summary judgment for Stull and remanded the case for further proceedings.<sup>72</sup> Circuit Judge Gorsuch authored the opinion and was joined by Circuit Judges Baldock and Bacharach.<sup>73</sup>

This case addressed two issues. First, whether a mineral owner or lessee can access the surface of a parcel of land to develop minerals on an adjacent parcel of land when all of the minerals have been placed into a unit.<sup>74</sup> Second, whether nonmutual offensive issue preclusion bars Entek from arguing for a determination of its rights under the Focus Ranch Unit Agreement.<sup>75</sup>

The court relied primarily on the language of the SRHA and the unitization provision of the 1931 amendment to the Mineral Leasing Act to determine whether Entek could cross Stull's land.<sup>76</sup> Under the SRHA, the federal government reserved the right to all of the minerals, the right to enter and use the surface to explore for and remove the minerals, and the right enact future laws regarding the disposal of the mineral estate.<sup>77</sup> The 1931 amendment to the Mineral Leasing Act allowed lessees to create a cooperative plan to develop the minerals in a larger area more effi-

---

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1259.

73. *Id.* at 1252.

74. *See id.* at 1253.

75. *Id.* at 1258.

76. *Id.* at 1254–56.

77. *Id.* at 1254.

ciently.<sup>78</sup> The Secretary of the Interior had to approve these unitization agreements.<sup>79</sup>

The Focus Ranch Unit Agreement stated that mineral development operations on any tract within a unit are “deemed to be performed upon and for the benefit of each and every tract of unitized land.”<sup>80</sup> Additionally, the SRHA reserved the right to enact future laws regarding the disposal of minerals.<sup>81</sup> So even if the SRHA did grant only the right to enter the surface of the parcel being developed, Congress modified that grant with the 1931 amendment to the Mineral Leasing Act.<sup>82</sup> Thus, the court found that Entek can use the surface above any lease in the unit, as long as the use is reasonably incident to the development of minerals of any lease within the unit.<sup>83</sup>

Stull claimed that *Mountain Fuel Supply Co. v. Smith*<sup>84</sup> should control because that court stated that unitization does not affect surface rights unless the mineral leases have been actually or legally modified.<sup>85</sup> The district court agreed with Stull by concluding that *Mountain Fuel Supply* meant, “Entek’s access to Stull’s surface estate is limited to the geographic boundaries of the lease from which Entek intends to extract minerals.”<sup>86</sup> The Tenth Circuit rejected Stull’s argument and the district court’s holding because the Focus Ranch Unit Agreement legally modified the lease by stating that development on one parcel of land in the unit is deemed to occur on all parcels within the unit.<sup>87</sup>

Next, Stull argued that it was not a party to the Focus Ranch Unit Agreement, so the agreement should not be binding on it.<sup>88</sup> The only real argument made for why that matters is that federal policy is too generous to the mineral owners at the expense of the surface owners.<sup>89</sup> The court

---

78. *Id.* at 1255.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1255–56.

83. *Id.* at 1256.

84. 471 F.2d 594 (10th Cir. 1973). *Mountain Fuel Supply* addressed the issue of whether a mineral developer could use the surface of the land surrounding the parcel it was developing because the lands had been unitized. *Id.* at 596. The court found that because the defendant had obtained title to all of the separate tracts in question, they were to be treated as one for the purposes of mineral development, subject to the geographic boundaries stated in the lease. *Id.* at 597. However, the court stated that unitization has no effect on a field, unless the unitization actually or legally modifies the mineral leases. *Id.* Thus, the mineral developer could not use the defendants’ surface for development of minerals under the lands of others in this case because, unlike in *Entek*, the unitization agreement did not modify the leases to allow for the surface use of any parcel. *Id.*

85. *Entek*, 763 F.3d at 1257.

86. *Entek GRB, LLC v. Stull Ranches, LLC*, 937 F. Supp. 2d 1328, 1339 (D. Colo. 2013) (citing *Mountain Fuel Supply*, 471 F.2d at 597).

87. *Entek*, 763 F.3d at 1257.

88. *Id.*

89. *Id.* at 1258.

rejected this argument by stating that “it is for Congress to set policy and this court to construe it.”<sup>90</sup>

Stull’s final argument was that nonmutual offensive issue preclusion barred Entek’s claim.<sup>91</sup> There must be privity between the party in the previous litigation and the party in the current litigation for nonmutual offensive issue preclusion to apply.<sup>92</sup> Privity is the existence of a relationship where the party in the previous litigation was protecting the rights of the party in the current litigation, in addition to its own rights.<sup>93</sup> The court found that Clayton Williams and Entek were closely related parties but were not in privity because the agreement between Williams and Stull was not meant to protect the rights of any future lessees.<sup>94</sup> Thus, nonmutual offensive issue preclusion did not bar Entek’s claim in this case.<sup>95</sup>

Therefore, the court determined that Stull could use as much of the surface as is reasonably incident to developing the minerals on the BLM land because of the Focus Ranch Unit Agreement.<sup>96</sup> The court vacated the district court’s grant of summary judgment for Stull and remanded the case for further proceedings.<sup>97</sup>

### III. ANALYSIS

In this part, I will first discuss the difficulty in resolving the issues between surface and mineral owners. Next, I will discuss whether *Entek* signals a shift away from the recent trend of increased rights for surface owners. After that, I will address whether *Entek* will have an effect on non-unitized leases. Finally, I will conclude with a few recommendations for improving relations between surface and mineral owners: (1) providing advance notice to the other party before taking action; (2) obtaining consensual surface use and right-of-way agreements; (3) directionally drilling; (4) selling mineral rights to the surface owner; and (5) including explicit surface use requirements in the mineral lease.

---

90. *Id.*

91. *Id.* Nonmutual offensive issue preclusion is defined as the “plaintiff seek[ing] . . . to prevent a defendant from relitigating an issue decided against the defendant in a previous action involving . . . a different party.” Note, *Nonmutual Issue Preclusion Against States*, 109 HARV. L. REV. 792, 792 n.4 (1996). The court appears to have misused this term, as Stull was the defendant, but there is not much difference between offensive and defensive issue preclusion. *Id.*

92. *Entek*, 763 F.3d at 1258.

93. *Id.* The definition of privity is “[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a . . . proceeding . . .).” BLACK’S LAW DICTIONARY 1320 (9th ed. 2009).

94. *Entek*, 763 F.3d at 1259.

95. *Id.*

96. *Id.*

97. *Id.*

*A. The Difficult Dilemma Between the Rights of Surface Owners and Mineral Owners*

Severed estates, land where two different parties own the surface and the minerals under the surface, have resulted in a large number of disputes.<sup>98</sup> *Entek* was one such dispute that resulted because of a severed estate. In order to better understand these disputes, it is helpful to have a brief history of how many severed estates came to be in existence.

Historically, minerals belonged to the surface owner or the government of the country in which they were located.<sup>99</sup> In England, gold and silver mines belonged to the Crown, but all other mines generally belonged to the landowner, so long as a conveyance had not severed them.<sup>100</sup> In 1785, Congress briefly adopted this concept of government ownership of minerals by passing an ordinance reserving one-third of all precious minerals to the government.<sup>101</sup> In 1807, Congress attempted to reserve and lease lead mines in Missouri, but the program lasted only until 1829.<sup>102</sup> Despite these efforts to reserve minerals to the government, there were very few severed estates in the U.S. until the mid-nineteenth century and early twentieth century.<sup>103</sup> A number of legislative acts designed to encourage people to settle the west brought about this expansion of severed estates.<sup>104</sup>

The Agricultural Homestead Act of 1862 was the first free land grant provided by the federal government to encourage expansion westward.<sup>105</sup> This Act did not reserve the minerals to the federal government.<sup>106</sup> It did, however, allow the surface owner to create a severed estate by selling the land and reserving some or all of the minerals to himself, selling the minerals and keeping the surface, or leasing the minerals to someone else.<sup>107</sup>

Beginning in 1909, Congress began reserving the minerals under the lands it granted to homesteaders to the federal government.<sup>108</sup> However, the Coal Land Acts of 1909 and 1910 reserved only coal to the fed-

---

98. Mergen, *supra* note 3, at 420.

99. Truhe, *supra* note 19, at 380.

100. 1 AMERICAN LAW OF MINING § 4.03 (Rocky Mountain Mineral Law Found. ed., 2d ed. 1983).

101. Truhe, *supra* note 19, at 380. This ordinance was no longer valid after the end of the Continental Congress. 1 AMERICAN LAW OF MINING, *supra* note 100, § 4.08.

102. 1 AMERICAN MINING LAW, *supra* note 100, §4.08.

103. See Truhe, *supra* note 19, at 380–82. Between 1909 and 1948, the federal government reserved all of the minerals underlying over 35 million acres, in addition to the minerals that it reserved under the 33 million acres granted under the SRHA. BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 2013 71–73 (2014).

104. Truhe, *supra* note 19, at 380–81.

105. *Id.* at 381.

106. *Id.*

107. *Id.*

108. *Id.* at 381–82.

eral government.<sup>109</sup> The SRHA, the act granting the land in *Entek*,<sup>110</sup> was the first act that generally reserved all of the valuable minerals underlying the land to the federal government.<sup>111</sup> These acts created huge swaths of land where some or all of the minerals were severed from the surface.<sup>112</sup> Severed estates are still very common today. As of 2013, the federal government still owns the minerals underlying 57.2 million acres of private lands.<sup>113</sup> These severed estates are almost entirely located west of the Mississippi River.<sup>114</sup>

With that history in mind, we can now move on to discuss how disputes between owners of severed estates are resolved. The mineral estate has long been considered the dominant estate.<sup>115</sup> This means that the mineral owner generally has a right to use the surface to develop the underlying minerals without interference from the surface owner.<sup>116</sup> Originally, the mineral owner could use as much of the surface as was reasonably necessary to explore for and develop the underlying minerals.<sup>117</sup> The right to use the surface has been limited over the years to further take into account the interests of the surface owner,<sup>118</sup> as will be discussed further in the next subsection.

There may not be a perfect solution to the disputes between surface owners and minerals owners. On one hand, you have the surface owner, who may use his or her land for a purpose that is vital to his or her livelihood, such as farming or, in the case of *Entek*, a hunting business.<sup>119</sup> On the other hand, you have a mineral owner, who has a right to develop the minerals underneath that surface estate. It is fairly easy to see how this could lead to disputes between the two parties.

Courts have diminished the common law doctrine that the mineral estate has absolute dominance over the surface estate to some degree, through rules such as the accommodation doctrine,<sup>120</sup> but the mineral estate is still the dominant estate.<sup>121</sup> It must remain the dominant estate

---

109. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 877 (1999) (holding that coalbed methane gas was not included in the reservation of coal).

110. *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1254 (10th Cir. 2014).

111. *Amoco*, 526 U.S. at 878.

112. *Truhe*, *supra* note 19, at 382 (stating that 33 million acres were patented under the SRHA alone).

113. BUREAU OF LAND MGMT., *supra* note 103, at 7.

114. *Id.* (listing only 300,000 acres of split estates in states east of, or bordering, the Mississippi).

115. *Mergen*, *supra* note 3, at 432.

116. *Id.*

117. *Id.*

118. *Id.* at 433.

119. *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1253 (10th Cir. 2014).

120. The accommodation doctrine requires the mineral developer to use reasonable alternatives to mitigate the impact on existing surface uses, if alternatives are shown to exist. *Lowe*, *supra* note 11, at 198; *see also* discussion *infra* Part III.B.

121. *Truhe*, *supra* note 19, at 390–91.

because there is no value in the mineral estate otherwise.<sup>122</sup> The mineral estate's value is derived from the right to develop the minerals, which cannot be accomplished without access to the surface.<sup>123</sup>

The *Entek* court realized the importance of the mineral estate retaining its dominance, in holding that Entek had a right to cross Stull's land to develop the minerals.<sup>124</sup> This comports with the traditional notions of property and mineral development law.<sup>125</sup> While it is understandable to feel some compassion for Stull because this ruling may greatly affect its business, the court followed the law as written and not as some would like it to be written.<sup>126</sup> Unfortunately for Stull, as the court noted, the policy argument that the current law favors mineral owners disproportionately to surface owners must be made to legislators, rather than the courts.<sup>127</sup>

Stull knew or should have known that mineral development could occur on its land at some point.<sup>128</sup> In fact, it is undisputed that Entek could use Stull's surface, if it was drilling a well on Stull's property.<sup>129</sup> Thus, Stull took a risk, by starting a hunting operation on its surface, that someday its business may be altered by a mineral lessee developing the minerals on the property.

The *Entek* ruling affirms the traditional notion that the mineral estate is the dominant estate.<sup>130</sup> It may seem that this is an expansion of that doctrine. However, based on the language of the Focus Ranch Unit Agreement and the legislative intent of the unitization amendment to the Mineral Leasing Act, it is really just a statement that the mineral owner can use as much of the surface on *any parcel within a unit* as is reasonably necessary to develop the minerals underneath any surface within that unit. This is only a slight variation on the traditional rule.

---

122. *Id.* at 385.

123. *Id.*

124. *Entek*, 763 F.3d at 1256.

125. Under common law that has been in existence for decades, the mineral developer, as the owner of the dominant estate, has an implied right to use the surface estate in any way reasonably necessary for mineral exploration and development. Ernest E. Smith, *The Growing Demand for Oil and Gas and the Potential Impact Upon Rural Land*, 4 TEX. J. OIL GAS & ENERGY L. 1, 7, 10 (2008).

126. Micheli, *supra* note 22, at 33 (arguing that surface owners often see the law regarding split estates as unfairly favoring the mineral estate).

127. *Entek*, 763 F.3d at 1258. The court did note that the Takings Clause of the Constitution could potentially have provided Stull some relief; however, Stull failed to make that argument. *Id.* at 1257–58.

128. Witwer, *supra* note 4, at 69 (concluding that surface owners are on constructive notice, if not actual notice, that mineral development may occur, no matter how many times the land has changed hands).

129. *Entek*, 763 F.3d at 1255.

130. Smith, *supra* note 125, at 10.

*B. Is Entek a Shift Away from Increased Protection for Surface Owners?*

As was previously stated, the trend has been to move away from the dominance of the mineral estate.<sup>131</sup> Along with the accommodation doctrine, surface damage statutes and mineral dormancy acts have increased protection for surface owners.<sup>132</sup>

North Dakota passed the first surface damage statute in 1975 for coal mining and passed a similar statute applying to oil and gas in 1979.<sup>133</sup> Since the North Dakota surface damage statutes were passed, eight other states have passed some version of a surface damage statute.<sup>134</sup> The North Dakota statute requires mineral developers to compensate surface owners for “the lost value of land and improvements, and the lost use of surface access.”<sup>135</sup> Thus, surface owners have the ability to obtain compensation for more damage than they would have had the mineral estate retained its traditional dominance over the surface estate.

States are also limiting the mineral estate’s dominance through mineral dormancy acts.<sup>136</sup> Mineral dormancy acts “allow ownership of the mineral estate, under specified conditions, to revert to the surface owner.”<sup>137</sup> In *Texaco, Inc. v. Short*,<sup>138</sup> the Supreme Court upheld mineral dormancy acts as constitutional because ownership of a mineral estate is not a constitutional property right.<sup>139</sup> Therefore, states have the power to extinguish mineral estate ownership.<sup>140</sup>

In *Entek*, the court appeared, at least at first glance, to buck the trend of providing additional rights for surface owners and move back toward the dominance of the mineral estate. When looking into the decision further, however, it appears that the court may have favored the dominance of the mineral estate more than some courts,<sup>141</sup> but not much, given the language of the statutes, the unit agreement, and traditional mineral development law.

---

131. Mergen, *supra* note 3, at 433.

132. See John F. Welborn, *New Rights of Surface Owners: Changes in the Dominant/Serviant Relationship Between the Mineral and Surface Estates*, 40 ROCKY MTN. MIN. L. INST. 22-1, 22-14 to -29 (1994).

133. *Id.* at 22-14.

134. *Id.* at 433 (claiming that North Dakota, South Dakota, Montana, Kentucky, Tennessee, Illinois, West Virginia, Oklahoma, and Texas all have some form of surface damage act).

135. Mergen, *supra* note 3, at 434. The Eight Circuit upheld this statute, primarily because it did not take away the mineral owner’s right to enter the surface to develop the minerals. *Id.* at 434 n.109 (citing *Murphy v. Amoco Prod. Co.*, 729 F.2d 552 (8th Cir. 1984)).

136. See Welborn, *supra* note 132, at 22-27.

137. *Id.*

138. 454 U.S. 516 (1982).

139. Welborn, *supra* note 132, at 22-28.

140. *Id.*

141. See *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 927 (Colo. 1997) (requiring the mineral lessee to take into account the surface owner’s rights and to use reasonable alternatives, if available); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (1971) (requiring the mineral lessee to adopt alternatives when available, if an existing use by the surface owner would be precluded or impaired).

Under the SRHA, the mineral developer has the right to “re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals . . . .”<sup>142</sup> Thus, mineral developers have always been required to use the surface in a reasonable manner, but the accommodation doctrine takes that a step further.

The Supreme Court of Texas created the accommodation doctrine,<sup>143</sup> and courts in numerous states have followed it.<sup>144</sup> The accommodation doctrine requires mineral developers to use alternative methods that are less harmful to the surface estate when developing subsurface minerals, if alternatives are shown to exist.<sup>145</sup> This may even require the developer to use alternatives that are more costly than the developer’s preferred method of development.<sup>146</sup> The accommodation doctrine is also called the due regard doctrine because it requires the mineral developer to “give due regard to the rights of the surface owner.”<sup>147</sup> However, the surface owner has the burden of showing that the surface use is unreasonable and that reasonable alternatives to that use exist.<sup>148</sup> While no court has specifically addressed whether the accommodation doctrine applies to federal mineral lessees, one district court has found that the accommodation doctrine does not create a federal question to establish federal jurisdiction.<sup>149</sup> However, other federal courts have applied the accommodation doctrine to private leases and state units.<sup>150</sup>

In a case that is very analogous to *Entek, Flying Diamond Corp. v. Rust*,<sup>151</sup> the Utah Supreme Court required that a mineral developer use an alternate route to access its development site because the alternate route was reasonable, and the surface owner would not have been able to use the surface for agriculture if the alternative route was not used.<sup>152</sup> The *Flying Diamond* court went on to state that the mineral developer must use alternatives, if the alternatives are “reasonable and practical ‘under

142. 43 U.S.C. §299(a).

143. Mergen, *supra* note 3, at 434 (citing *Getty Oil*, 470 S.W.2d 618).

144. *See, e.g., Gerrity*, 946 P.2d at 927; Mergen, *supra* note 3, at 434 (citing *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974), *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894 (N.M. 1985), *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976)).

145. Truhe, *supra* note 19, at 388.

146. *Id.*

147. *Id.* (internal quotation marks omitted).

148. Mergen, *supra* note 3, at 435.

149. *BTU W. Res., Inc. v. Berenergy, Corp.*, 31 F. Supp. 3d 1346, 1350, 1352 (D. Wyo. 2014) (holding that the “Accommodation Doctrine is a traditional state law doctrine[.]” so the court cannot create a federal accommodation doctrine without altering the balance between federal and state judiciaries).

150. *See, e.g., Amoco Prod. Co. v. Thunderhead Investments, Inc.*, 235 F. Supp. 2d 1163, 1173 (D. Colo. 2002) (applying the accommodation doctrine principles from *Gerrity* to a lease from a private party); *Fisher v. Continental Res., Inc.*, 49 F. Supp. 3d 637, 641 (D.N.D. 2014) (applying the accommodation doctrine adopted by the North Dakota Supreme Court to a unit created by the state).

151. 551 P.2d 509.

152. Mergen, *supra* note 3, at 435 (citing *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976)).

the circumstances.”<sup>153</sup> Stull may have had a similar argument in *Entek*; however, there is no record that Stull argued for any alternatives in this case.<sup>154</sup> Stull did argue generally that Entek should use “[a]lternative locations . . . as well as means of operations” to decrease the impact on Stull’s surface in the district court but did not express what specific alternatives were available to Entek.<sup>155</sup>

Stull’s failure to argue for specific alternatives, which may or may not have existed, is most likely the primary reason why the accommodation doctrine did not apply in *Entek*. “The accommodation doctrine is not a balancing type test weighing the harm or inconvenience to the owner of one type of interest against the benefits to the other.”<sup>156</sup> The surface owner has the burden of proving that alternatives exist.<sup>157</sup> Once it has been shown that reasonable alternatives exist, the court will then balance the interests of the surface and mineral owners.<sup>158</sup>

In *Entek*, based on the record before the court, the only available access road to Entek’s well on the BLM land ran through Stull’s land.<sup>159</sup> Thus, Entek’s use of the road must be considered reasonable because it was the only access point, and no reasonable alternatives were brought to the court’s attention. This comports with the accommodation doctrine because the mineral estate is still dominant under that doctrine, so long as the mineral developer’s surface use gives due regard to the rights of the surface owner and no reasonable alternatives are shown to exist.<sup>160</sup> Following this reasoning, Entek still has the right to use the only access road in order to develop the minerals that it has leased because the mineral estate is dominant.

Therefore, the Tenth Circuit’s decision in *Entek* does not appear to alter the accommodation doctrine or expand the rights of the mineral estate. It simply grants Entek the reasonable use of the surface afforded to it by the SRHA, the 1931 amendment to the Mineral Leasing Act, and the Focus Ranch Unit Agreement.

---

153. *Id.* at 436 (quoting *Flying Diamond*, 551 P.2d at 511).

154. See Appellee’s Brief, *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252 (10th Cir. 2014) (No. 13-1172).

155. Stull Ranches, LLC’s Amended Third Counterclaim, *Entek GRB, LLC, v. Stull Ranches, LLC*, 937 F. Supp. 2d 1328 (D. Colo. 2013) (No. 11-cv-01557-PAB-KLM). Stull did recommend directionally drilling from the BLM land, but that alternative relates only to development of the minerals under Stull’s land, not access to the well on the BLM land, which was the subject of this case. *Id.*

156. Truhe, *supra* note 19, at 389 (quoting *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 137 (N.D. 1979)).

157. *Id.*

158. *Id.*

159. *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1253 (10th Cir. 2014).

160. Truhe, *supra* note 19, at 389.

*C. Effect on Access to Non-Unitized Leases*

In *Entek*, the Tenth Circuit determined that the surface of all tracts of land within federal units can be used by mineral developers as if they were one parcel.<sup>161</sup> The court placed a lot of weight on the Focus Ranch Unit Agreement's provision that "mining activity on any leasehold in the unitized area is deemed to occur on *all* leaseholds."<sup>162</sup> The Colorado unitization statute provides that "[a]ll operations . . . upon any portion of the unit area shall be deemed for all purposes the conduct of such operations upon each separately owned tract in the unit area . . ."<sup>163</sup> Based on the language of the Colorado statute, it is likely that mineral developers holding leases joined into state units in Colorado could use the surface of the entire unit as well. So the next question is whether *Entek* has an effect on a mineral developer's right to access non-unitized lands. In order to determine the effect on non-unitized lands, it is important to first discuss unitization and why the *Entek* court ruled the way it did.

Stull's land was part of a 40,000 acre unit, created by the Focus Ranch Unit Agreement.<sup>164</sup> When land is unitized, the lessor generally receives a share of the royalty proportionate to the amount of land that it has in the unit, regardless of which tract of land contains the producing well.<sup>165</sup> Unitization is meant to conserve resources and prevent waste, as well as protect landowners' correlative rights.<sup>166</sup> Unitization under the Mineral Leasing Act requires the Secretary of the Interior to approve the unitization agreement.<sup>167</sup> In approving the unitization agreement, the Secretary is modifying the terms of leases contained within the unit.<sup>168</sup> Thus, the unitization agreements, once approved, modify the prior individual leases where the terms are inconsistent.

The Focus Ranch Unit Agreement stated that mineral development on any tract within the unit shall be considered to be "performed upon and for the benefit of each and every tract of unitized land."<sup>169</sup> Because the unitization agreement combined all of the tracts within the unit into one for purposes of production, the terms of the unitization agreement are what granted *Entek* access to Stull's surface estate. Once it was determined that the unitization agreement essentially created a single tract of land for purposes of production, it is clear that *Entek* could use as

---

161. *Entek*, 763 F.3d at 1256.

162. *Id.*

163. § 34-60-118(9).

164. *Entek*, 763 F.3d at 1255.

165. *Amoco Prod. Co. v. Heimann*, 904 F.2d 1405, 1411 (10th Cir. 1990).

166. *Id.* at 1410-11. Correlative rights require each landowner overlying a common reservoir to refrain from interfering with the ability of the other landowners to exercise their right to capture the underlying minerals. *LOWE ET AL.*, *supra* note 10, at 60.

167. 30 U.S.C. § 226(m).

168. *Id.*

169. *Entek*, 763 F.3d at 1255.

much of the surface as was reasonably required to develop the minerals, based on the rights granted by the SRHA.

When it comes to accessing non-unitized tracts of land, the result will likely be quite different. In a situation similar to *Entek*, where a mineral lessee holds leases underlying multiple tracts of adjacent land but the leases are not unitized, the law allows access to only the tract under which the minerals will be developed.<sup>170</sup> The mineral producer would not be allowed to cross one tract to produce the minerals on an adjacent tract, even if it holds leases to both tracts.<sup>171</sup>

It may also be difficult for a mineral developer to gain access to leases on federal or state lands.<sup>172</sup> When the BLM leases minerals to private parties, it does not guarantee access to those minerals.<sup>173</sup> Access to previously issued federal leases across federal lands may be denied, if it is determined to be in the public interest to do so.<sup>174</sup> State land departments also have the authority to limit right of way access to protect state interests.<sup>175</sup> Thus, both the federal government and the states also have the authority to shut off access to landlocked mineral leases.

*Entek* is not likely to extend to these types of situations, where a private party or the federal or state government on non-unitized lands blocks the mineral lessee out. The ruling in *Entek* was primarily based on the unitization agreement essentially creating one parcel,<sup>176</sup> which is not the case simply because a lessee does not have access to the surface of a parcel to which it holds the mineral rights. If it is a private party, the mineral lessee can attempt to negotiate with the surface owner to reach a right-of-way agreement.<sup>177</sup> If it is federal or state land, the mineral lessee may be burdened by significant restrictions or denied access altogether.<sup>178</sup>

#### *D. Recommendations for Improving Surface Estate/Mineral Estate Relations*

As discussed previously, the tension is often high between surface and mineral owners of severed estates. This subsection will set forth a few recommendations for easing that tension: (1) providing advance notice to the other party before taking action; (2) obtaining consensual surface use and right-of-way agreements; (3) directionally drilling; (4) sell-

---

170. Clyde O. Martz, Rebecca Love & Charles L. Kaiser, *Access to Mineral Interests by Right, Permit, Condemnation or Purchase*, 28 ROCKY MTN. MIN. L. INST. 1075, 1078 (1982).

171. *Id.*

172. “[N]o right of access exists by necessity across private lands to reach federal lands . . .” *Id.* at 1079 (citing *Leo Sheep v. United States*, 440 U.S. 668 (1979)).

173. *Id.* at 1094.

174. *Id.* at 1095.

175. *Id.* at 1099.

176. *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1256 (10th Cir. 2014).

177. Martz et al., *supra* note 170, at 1080.

178. *Id.* at 1095–96, 1099.

ing mineral rights to the surface owner; and (5) including explicit surface use requirements in the mineral lease.

#### 1. Providing Advance Notice to the Other Party before Taking Action

The first way to ease tension is to provide notice to all parties with interests in a severed estate when one party plans to exercise its rights. In Colorado, a state statute requires the surface owner to notify mineral owners at least 30 days before a public hearing on a surface development application.<sup>179</sup> The surface owner is also required to inform the local government of the name and address of the mineral owner.<sup>180</sup> Colorado also requires that oil and gas developers give notice to the local government, so that a public comment period, on-site inspection, and a hearing can take place, prior to the issuance of a drilling permit.<sup>181</sup>

Additionally, the mineral estate should make an effort ensure that the surface owner is aware that the estate is severed, even though the surface owner may be on constructive notice if the conveyance has been recorded.<sup>182</sup> Some companies have gone further than this and have even implemented public education programs to better inform the public about the ramifications of severed estates.<sup>183</sup> By making the other parties aware earlier, the owners of severed estates will reduce the risk of issues arising after they have invested a lot of time and money into their use of their estate. Advance notice will also make it more likely that the parties will be able to reach a consensual agreement regarding surface use, which is discussed further in the next paragraphs.

#### 2. Obtaining Consensual Surface Use and Right-of-Way Agreements

The next suggestion for improving surface/mineral relations is obtaining consensual surface use and right-of-way agreements. It is in the best interest of both parties to come to an agreement about the best place for access roads and mineral production operations. Some people have pushed for the states to make surface agreements mandatory.<sup>184</sup> This has been mostly unsuccessful, however, because mineral estate owners do not want to give up some of their dominance.<sup>185</sup> In Colorado, mineral

---

179. Jeffrey R. Fiske & Ann E. Lane, *Urbanization of the Oil Patch: What Happens When They Pave Paradise and Put Up a Parking Lot?*, 49 ROCKY MTN. MIN. L. INST. 15-1, 15-14 (2003).

180. *Id.*

181. *Id.* at 15-16.

182. *Id.* at 15-26.

183. *Id.* at 15-27.

184. LoValerie Mullins, *The Equity Illusion of Surface Ownership in Coalbed Methane Gas; the Rise of Mutual Simultaneous Rights in Mineral Law and the Resulting Need for Dispute Resolution in Split Estate Relations*, 16 MO. ENVTL. L. & POL'Y REV. 109, 191 (2009).

185. *See id.* (noting that Montana has defeated all such regulation attempts, but Wyoming has passed a statute that requires surface use agreements).

developers must consult with the surface owner in good faith regarding location of its operations on the surface.<sup>186</sup>

As the dominant estate, the mineral owner will be able to access the surface regardless of whether a consensual agreement can be reached. Because of this inequality in bargaining power, the surface owner will generally have to pay more if it wants a more restrictive surface use agreement.<sup>187</sup> The SRHA does require that mineral developers post bond if they cannot reach an agreement with the surface owner, but the bond covers only damage to “crops and tangible improvements.”<sup>188</sup> However, if both parties can come to an agreement about how mineral development will occur, it will lead to less hassle and potentially fewer lawsuits. Additionally, these negotiations may lead to reasonable alternatives that the surface owner could use to invoke the accommodation doctrine, if an agreement cannot be reached and a lawsuit arises.

### 3. Directionally Drilling

With the advancements in directional drilling,<sup>189</sup> surface owners often seek this option when determining where to place a drill site.<sup>190</sup> Directional drilling minimizes surface impact by allowing developers to drill more wells from a single well pad.<sup>191</sup> It is not clear whether the accommodation doctrine would require directional drilling, so most mineral developers simply consider it a convenience and require that the surface owner pay for this additional cost.<sup>192</sup> However, surface owners are increasingly arguing that mineral developers should pay for the increased cost of directional drilling due to the accommodation doctrine.<sup>193</sup>

The primary concerns with an agreement to directionally drill are that the mineral developer will not drill the well because it may become uneconomical or that the surface developer will no longer be around to pay if the well is drilled in the future.<sup>194</sup> To resolve these issues, one commentator suggested that the contributions by the surface developer could be placed in escrow and released to the mineral developer when the well is drilled or released back to the surface developer if a well is

---

186. Jean Feriancek, *Competing Mineral and Surface Development—One State’s Struggle*, NAT. RESOURCES ENVTL., Summer 2002, at 36, 37.

187. *Id.*

188. 43 U.S.C. §299(a).

189. A directional well is a well that is not drilled only vertically but rather is curved or horizontal. Evan J. House, *Fractured Fairytales: The Failed Social License for Unconventional Oil and Gas Development*, 13 WYO. L. REV. 5, 19 (2013). Recently, technological advancements in horizontal drilling processes and hydraulic fracturing have made oil and gas development more economical and spurred mineral production. *Id.* at 9–10.

190. Fiske et al., *supra* note 179, at 15-32.

191. House, *supra* note 189, at 20. By using fewer well pads, the impact on the surface is further reduced because fewer roads are needed to gain access to the pads. *Id.*

192. Fiske et al., *supra* note 179, at 15-32.

193. *Id.*

194. *Id.* at 15-33.

not drilled within a specified period of time.<sup>195</sup> This would allow both parties to develop the surface and the minerals on their own schedule without fear of losing out on their agreement.

#### 4. Selling Mineral Rights to the Surface Owner

Another option to ease tension between the parties is to sell the mineral rights to the surface owner. This can include selling the lease, any currently existing wells, or the right to use the surface.<sup>196</sup>

A few caveats are required with this option. When selling the mineral rights, it is important to examine the terms of the lease to determine if there is any obligation to the royalty owners or working interest partners to actually develop the minerals.<sup>197</sup> This will help avoid potentially unforeseen problems due to the lack of mineral development.<sup>198</sup> Additionally, the surface owner that is purchasing the mineral rights needs to be aware that there may be multiple mineral lessees of the different subsurface formations.<sup>199</sup> If there are multiple owners of the mineral rights to different formations, the surface owner will need to purchase the mineral rights from each mineral owner to ensure that no development takes place on the surface. Finally, if purchasing only a lease, the surface developer needs to be aware of when the lease ends and take steps to ensure that the mineral owner does not lease the property to another mineral developer.<sup>200</sup>

#### 5. Including Explicit Surface Use Requirements In the Mineral Lease

My final recommendation is to explicitly place surface use requirements in the lease. This will not work in many instances, as the current surface owner may not have been the party that executed the lease,<sup>201</sup> or the land may have been severed prior to surface owner gaining ownership.<sup>202</sup> If the surface owner is the party executing the lease, this will help

---

195. *Id.*

196. *Id.* at 15-35.

197. *Id.* The implied covenant to develop requires a lessee that has drilled a well to “continue to develop as would a reasonable prudent operator under the circumstances.” *LOWE ET AL.*, *supra* note 10, at 363.

198. This statement assumes that the surface owner is purchasing the mineral rights in order to stop a mineral owner from using the surface and does not plan to develop the minerals itself.

199. Fiske et al., *supra* note 179, at 15-38 (explaining that in the DJ Basin, one developer may hold rights to develop the “J” Sand and another might hold rights to develop the Codell/Niobrara).

200. *See id.*

201. *See* *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 620 (Tex. 1971) (“In 1955 Jones purchased the 635 acre tract of land in question, which was subject to prior mineral leases in which he acquired no interest.”).

202. *See* *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1254 (10th Cir. 2014) (“Stull is the successor in interest to land grants provided under the 1916 Act.”).

because when interpreting contracts, the first place that courts look is the explicit language of a lease.<sup>203</sup>

Surface damage liability is one important clause that could be placed in a lease. Generally, a mineral developer is required to compensate the surface owner only for damage to crops and agricultural improvements.<sup>204</sup> So by placing explicit language in the lease, the parties can have a clear understanding of what damage will be compensable.

By working together, both the surface and mineral owners will be more likely to avoid unnecessary hassles and expensive litigation. It is important to remember that the mineral estate has the implied right to use the surface to develop the underlying minerals,<sup>205</sup> so it is in the best interests of the surface owner to compromise to ensure it has some say in how the mineral owner uses the surface.

These recommendations will not work in all situations, and disputes between surface owners and mineral owners will likely continue to arise as long as severed estates exist. However, if surface and mineral owners attempt to work together, it is more likely that fewer disputes will arise when developing our country's valuable subsurface minerals.

#### CONCLUSION

The Tenth Circuit, in *Entek*, correctly found that unitization gives mineral owners a right of access across adjacent parcels within a unit, if it is reasonably necessary for mineral development. While this may seem to erode the rights of surface owners, it really just upholds the goals of unitization and efficient mineral development. This ruling does not seem to change the accommodation doctrine or other protections surface owners have gained in recent years. *Entek* simply gives the mineral developer the ability to develop the minerals that it has leased, which may also benefit the surface owner whose land the mineral developer uses for access.

Mineral development is incredibly important in the United States, due to the large amount of oil and gas consumed.<sup>206</sup> Unfortunately, the bur-

---

203. See 16 John R. Paddock Jr., WEST'S COLORADO PRACTICE SERIES, § 5.5(b) (2d ed. 2013) (explaining that the goal of contract interpretation is to give effect to the intention of the parties, which is determined primarily from the express language of the contract).

204. John M. Stocker, Jr., *Protection for Surface Owners of Federally Reserved Mineral Lands*, 2 UCLA ALASKA L. REV. 171, 172 (1972-1973).

205. Truhe, *supra* note 19, at 392.

206. The United States consumed 18.49 million barrels of petroleum products per day and just over 25.53 trillion cubic feet of natural gas in 2012. *Overview data for United States*, U.S. ENERGY INFORMATION ADMINISTRATION, <http://www.eia.gov/countries/country-data.cfm?fips=US#pet> (last updated May 30, 2013).

dens on the surface estate are a necessary evil of mineral development. *Entek* ensures that these minerals can be produced in the most efficient way possible by following traditional property and mineral development law and upholding the dominance of the mineral estate.

*Tyson Welch*\*

---

\* J.D. Candidate 2016, University of Denver Sturm College of Law. I would like to thank Professor Federico Cheever for his valuable input and guidance. I would also like to thank Lauren Wolongevicz and Nick Rising for their feedback and assistance.